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No. 87-599

Supreme Court, U.S.

FILED

DEC 3 1987

JOSEPH F. SPANIOLO, JR.
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In The
Supreme Court of the United States
October Term, 1987

MASTER, MATES & PILOTS PENSION PLAN, et al.,
Petitioner,

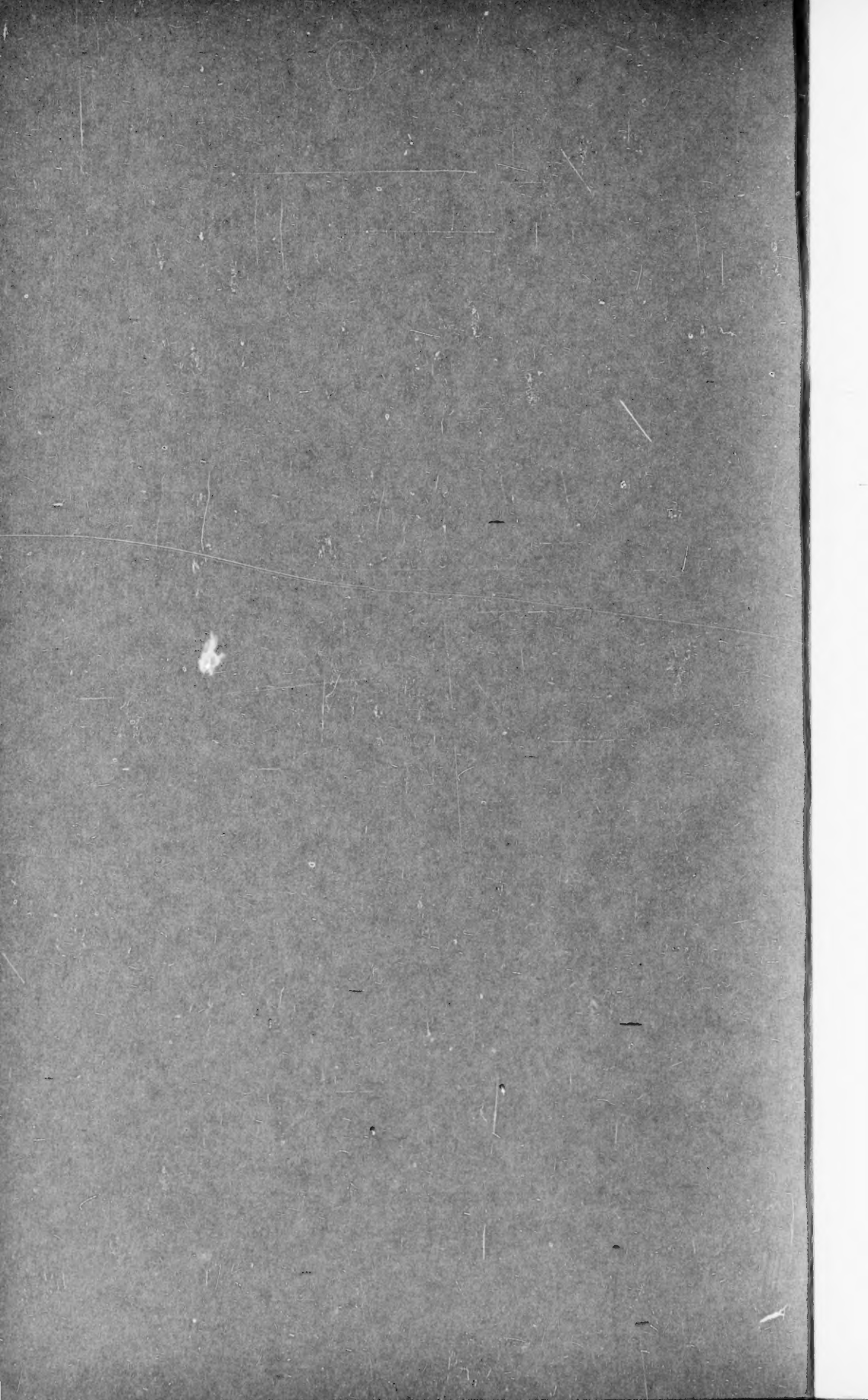
v.

WILLIAM F. DEAK, et al.,
Respondents.

**BRIEF IN OPPOSITION TO A PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED BY THE PETITION

1. Does *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) prevent a trial court from reviewing the motives of the trustees in enacting punitive, discriminatory penalties against Plan beneficiaries who work under rival unions for non-Plan employers where the collective bargaining agreement does not require such punishment?

2. Where the Trustees do not show the collective bargaining agreement resulted from "explicit, informed and intense bargaining," and the collective bargaining agreement does not require the "arbitrary and capricious" amendment does *Robinson* prevent court review?

3. Did the failure of the Plan to present the *Robinson* point to the trial court waive the point for discretionary review by certiorari?

4. Where, on conflicting evidence, the trial court found that the trustees enacted the discriminatory and punitive provisions for the benefit of the Union and not for the benefit of the beneficiaries of the plan, should this Court in its discretion review this case by Certiorari?

5. Where this case involves a unique group of seamen, unusual trustee action, unique facts and the Eleventh Circuit specially limited the holding to these facts should this Court review this case by Certiorari?

Additionally, Respondents pray that this Court in its discretion will, only in the event that certiorari is granted on the petition, treat this Opposition as a conditional cross-petition for certiorari. The jurisdiction for

the conditional cross petition is the same as that set out in the original petition. Jurisdiction to grant the conditional relief prayed for stems from R. Stern & E. Gressman, *Supreme Court Practice*, 482-486, specifically at 486 (5th Ed.1978).

In the courts below the plaintiffs, conditional cross petitioners here, contended that the court should hold that they had vested pensions not subject to suspension by the trustees. Only if this Court grants Certiorari Respondents desire to present the issues on termination and suspension:

1. Had the Plaintiffs-Cross Petitioners Reached Normal Retirement Age As Defined by the Treasury Department/Internal Revenue Service so as to prevent termination or suspension of benefits?

2. Did the Trial Court Err in Relying on Early Retirement Cases and Refusing to Follow *Nichols v. Asbestos Workers Local 24 Pension Plan*, (D.D.C. Feb. 26, 1979) (unreported opinion) holding that years of service rather than age could determine "Normal Retirement Age"?

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STATEMENT OF THE COURT'S JURISDICTION

This Petition for Certiorari seeks to have the Court exercise its discretionary jurisdiction to prevent the lower courts from issuing opinions alleged to be contrary to the holding in *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). Respondents contend that no conflicts with either *Robinson* or other courts decisions exist.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Petition sets out the applicable statutes.

STATEMENT OF THE CASE

Introductory Statement

Captain Deak and others, for the class represented, sued the Masters Mates and Pilots Pension Plan (Plan) under ERISA, 28 USC Chapter 18, to recover benefits due members of the class under the terms of the Plan and to redress violations of ERISA.

Statement of the Facts

In 1976 the Trustees adopted bad boy/punitive Amendment 46, designed to deprive a pensioner of his pension during employment and six months following. Amendment 46 penalized any pensioner employed by a nonparticipating company by depriving the pensioner of his vested benefits until age 65.

Unlike Amendment 46, the bargaining agreement stated only that pensioners should not work. It contained

no penal or enforcement provisions. The bargaining agreement gave the Trustees discretion to work out the method of stopping pensioners from working.

Each Plaintiff had 20 years or more of pension credit, had retired, had been receiving a "regular pension" under the Plan, and had not reached 65 years of age. Each was working for an employer who had a contract with a rival maritime union.

The Plaintiffs' evidence showed that Trustees adopted the bad boy/punitive clause primarily to protect the Masters, Mates & Pilots Union by preventing its members from switching jobs and union allegiance. The Defendants attempted to show that the Trustees acted for the benefit of the Plan—to protect its financial integrity. The Union contract did not require the amendments to be made. The Plan did not show that the provision in the "bargaining agreement" relied on by Petitioner, resulted from intense collective bargaining.

The court found the Defendants' after-the-fact explanations of a need for Amendment 46 refuted by the Trustees' own testimony. Petitioner's Appendix at 31a. MM&P Union counsel drafted the amendment while the MM&P Union was competing with other maritime unions for members. Petitioner's Appendix at 32a. The trial court found that the Plan Trustees had breached their statutory duty by acting for the benefit of the MM&P Union and not "for the purpose of providing benefits to participants. . . ." The trial court found no actuarial need for this change, since the Plan had adequate funding and was actuarially sound. The Trustees' minutes contained no

actuarial studies or projections to justify the amendment, even though actuaries were actively advising the Trustees on other pension matters. The trial court found the Plan amendment to impose differing penalties without consideration of less drastic provisions. Petitioner's Appendix at 32a. The trial court rejected the Plan's defenses as after-the-fact justifications. Petitioner's Appendix at 31a.

The Petition contends that the Trustees acted under a command of the collective bargaining agreement in passing the "bad boy" amendment. The Petitioner did not present this point to the trial court. The trial court did not pass on the point for this reason. *See* Memorandum Opinion and Orders, Petitioner's Appendix at 18-41a. The issues defined by the trial court do not mention the *Robinson* defense. Petitioner's Appendix at 23a. No references to a command of the collective bargaining agreement appears in the Plan's post trial brief.

The trial court recognized that, if a rational justification exists, it could not set aside the trustees' action unless it is arbitrary, capricious, violates a statutory duty, or is in bad faith. Petitioner's Appendix at 29-30a. The trial court found "that the Trustees in this instance breached their statutory fiduciary duty in adopting Amendment 46 by discouraging members who were eligible for their pension from accepting any job which benefitted a competing union." Petitioner's Appendix at 30a.

The court found "that the Trustees were primarily motivated by a desire to protect the Union through the passage of the Amendment and were not acting 'for the exclusive purpose of providing benefits to participants. . . .'" Petitioner's Appendix at 32a.

The trial court canceled Amendment 46 to the extent that it suspended benefits for any month following cessation of employment, (Petitioner's Appendix at 36a.) and ordered restoration of such suspended benefits with interest. Petitioner's Appendix at 40-41a.

The Court of Appeal's Decision

The Eleventh Circuit's opinion by Senior Judge John Brown upheld the trial court's finding that, unlike the common law, ERISA does not excuse a trustee who fails to act "for the exclusive purpose of providing benefits to participants" even though contract or trust documents require such action. The opinion held that ERISA excused the "acting under document command" defense only if the action accords with ERISA's statutory duty; further, that ERISA prohibits Trustees from following the collective bargaining agreement if it "violates the provisions of ERISA. The Trustees are unable to surmount federal law with a private agreement." Petitioner's Appendix at 8a.

The Eleventh Circuit carefully limited its holding to the unique facts in suit. Petitioner's Appendix at 16a-17a. The opinion upholds the trial court's findings that the Trustees' aim to strengthen the union furnished the primary motivation for enacting the arbitrary, capricious and discriminatory amendment. This violated the "Trustee's fiduciary duty of loyalty to the plan participants." The Eleventh Circuit found that, while the evidence conflicted, testimony supported the finding that the Trustees acted for the primary benefit of the Union in adopting amendment 46 "which arbitrarily and unjustifiably discriminated

among participants of the plan.” Petitioner’s Appendix at 17a.

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REASONS FOR DECLINING TO ISSUE THE WRIT

- A. Since This Case Involves Particular Seamen, Unusual Trustee Action, Unique Facts and The Eleventh Circuit Specially Limited The Holding to These Facts This Court Should Not Review This Case By Certiorari.**

The Eleventh Circuit carefully limited its holding:

We do not hold . . . in all circumstances a provision . . . even identical with, Amendment 46 would violate ERISA. If the Trustees . . . demonstrate that a provision is rationally related to the financial integrity of the Plan and is adopted absent . . . any conflicts of interest, consistent with their fiduciary duties, ERISA’s protection of the participants and beneficiaries could be satisfied.

The Eleventh Circuit found that testimony supported the finding that the Trustees acted arbitrarily and capriciously for the primary benefit of the Union in adopting amendment 46 “which arbitrarily and unjustifiably discriminated among participants of the plan.” Petitioner’s Appendix at 17a.

United States Supreme Court Rule 17.1 points out, “[a] review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefor.” Certiorari should be granted only where there are important issues to be determined, not to retry unique factual issues.

Petitioners have shown no reason to exercise discretionary jurisdiction.

B. Since the Trial Court Did Not Hear or Pass On the Robinson Contention, This Court Should Decline To Exercise Discretionary Jurisdiction.

The Petitioners failed to brief and present this collective bargaining agreement defense to the trial court and thus waived the issues presented in the Petition. *D.H. Overmeyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir.), cert. denied, 404 U.S. 851 (1971).

These Respondents contended in the Eleventh Circuit that this *Robinson* defense was another afterthought not raised in the trial court and not properly preserved for appellate review. The Eleventh Circuit avoided that contention by holding that since the trial court had found the objectionable rule contravened the commands of ERISA even a direct command of the collective bargaining agreement would not save it.

Petitioners contended in the Eleventh Circuit that they raised the point in the trial court in their post trial brief. They contended that the bargaining agreement commanded the offending action as required by *Robinson*. The post trial brief contains only an oblique reference at p.31:

Plaintiff's argument that the 1975 collective bargaining agreement *prevented* the Trustees from amending the Rules is wrong. That contract merely adopts the plan and Trust Agreement "as is", and does not *prohibit* further changes. Trustee power to adopt Plan amendments flows from the Trust Agreement and statutory authority. Plaintiff's also overlook section XXIX C. par. 8, which *provides for prohibiting pensioners from working* in the maritime industry after

a pension is awarded (emphasis added and citations omitted).

This response to the Plaintiffs' brief does not assert that the bargaining agreement *commands* the action in suit but only contends that the bargaining agreement does not prevent the action. The failure to present this point to the trial court constitutes a waiver of the defense.

C. The Court Should Not Grant Certiorari Since The Decision Below Follows this Court's Opinion in Robinson and the Unbroken Line of Lower Court Cases Building Upon it. The Amendment Did Not Come Within the Protection of Robinson Because: (1) The Union Contract Did Not Require the Arbitrary and Capricious Penalties Used But Left to the Trustees the Method of Implementation Under ERISA; (2) The Petitioner Did Not Show That The Union Contract Provision Relied On Here Resulted From the Intense Bargaining Process Required by Robinson; (3) Amendment 46 Violated a Positive Command of ERISA Because the Trustees Enacted It Primarily to Protect the Union And Not For the Benefit of the Participants of the Plan; and (4) Issue Preclusion and The Law of The Case Govern the Issues Here Because of the Decision In a Companion Case On the Same Union Contract and Plan.

1. The Union Contract Did Not Require the Arbitrary and Capricious Penalties Used But Left to the Trustees the Method Of Preventing Pensioners From Working;

The Trustees contend that *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) eviscerated the arbitrary or capricious standard of review of Trustee's acts. The Supreme Court and the Circuits have refrained from so broad a holding. The courts have limited *Robinson* to self-executing provisions of the bargaining agreement and not to rules made by the

Trustees to interstitially flesh out non-self-executing provisions of the type here in issue. Where the collective bargaining agreement only sets broad goals and leaves the means of carrying out the agreement to the trustees' independent rule making power then the Courts may still subject the rules so enacted to the arbitrary and capricious standard of review.

In *Robinson* the court narrowly held:

[W]hen neither the collective bargaining process nor its product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.

455 U.S. at 576, (emphasis added).

The trial court here specifically found that the "end product" violated the command of Congress that the trustees act for the sole benefit of the Plan beneficiaries.

The Sixth Circuit follows the limited *Robinson* rule:

The present case is distinguishable . . . [from *Robinson*] because Resolution 72 was created not by a collective bargaining agreement, but by the Fund's trustees. While the Supreme Court specifically refused in *Robinson* to apply cases which had allowed review of trustee-created eligibility rules, the Court did not overrule those cases. Absent a clearer indication that *Robinson* governs trust fund rules *formulated by trustees as well as those included in collective bargaining agreements*, we hold that § 186(e) provides jurisdiction over the present claim.

Sellers v. O'Connell, 701 F.2d 575, 577 (6th Cir.1983) (emphasis added). The courts have applied *Robinson* only where the contested rules appear fully formed in the collective bargaining agreement. Before even this limited

application, the courts require the Trustees to prove that the collective bargaining agreement resulted from open free negotiation in fulfilling collective bargaining obligations. *Ponce v. Const. Laborers Pension Trust*, 774 F.2d 1401, 1405 (9th Cir.1985) (“*Robinson* . . . does draw a line between rules which were the subject of bargaining and those which were determined by the trustees.”); *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir.1985) (The trial court severed this case from the case at bar. It involves the same Trustees, plan and amendment.); *Local 50, Bakery & Confect. Union v. Local 3, Bakery & Confect. Union*, 733 F.2d 229, 236 (2d Cir.1984) (“Nonetheless, the Court explicitly left open the question of whether federal courts of equity may enforce a trustee’s traditional fiduciary duties.”); *Murn v. United Mine Workers*, 718 F.2d 359, 361 (10th Cir.1983) (“[In *Robinson*] the eligibility requirements had been specifically set by the collective bargaining agreement. The Court distinguished cases . . . in which the trustees had been given authority to decide eligibility requirements.”); *Elser v. I. A. M. Nat. Pension Fund*, 684 F.2d 648, 653 (9th Cir.1982), *cert. denied*, 464 U.S. 813 (1983) (“The court recognized a distinction between *Robinson* and those cases in which the eligibility rules and benefit levels are fixed by the trustees of the fund.”)

This collective bargaining agreement does not provide the penalties objected to by the trial court. The agreements’ ¶ XXIX (C)(9) provides in full:

9. Pensioners will be prohibited from working at any job in the maritime industry after a pension is awarded: except the Trustees may permit reemploy-

ment in shoreside positions covered by a collective bargaining agreement of the [MM&PU]. (Petition for Certiorari at 4.)

This provision neither requires a penalty nor does it require action by the Trustees. The prohibition is not self-executing. To enforce the prohibition the Trustees must exercise discretion in creating a remedy following the commands of ERISA.

2. The Petitioner Did Not Show The Union Contract Provision Relied On Resulted From the Intense Bargaining Process Required by Robinson;

Robinson does not apply here because the Plan did not prove ¶ 9 of the bargaining agreement resulted from the "explicit, informed, and intense bargaining" required by *Robinson*. Without evidence showing the bargaining process the court may not determine this issue. *Shishido v. SIU-Pacific District-PMA Pension Plan*, 587 F.Supp. 112, 117 (N.D.Cal.1983) ("Given the absence of such evidence, it is not possible to determine whether, as required by *Robinson*, . . . [this issue] was the subject of 'explicit, informed and intense debate' during the course of negotiations concerning pension plan eligibility requirements."); *Harm v. Bay Area Pipe Trades Pen. Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir.1983) ("No claim is made that these rules were adopted in collective bargaining, so the standard of review in . . . *Robinson* . . . does not apply."); *Hurn v. Retirement Fund Trust.*, 703 F.2d 386, 389 (9th Cir.1983) ("In *Robinson* the Court distinguished provisions that had been the "subject of explicit, informed and intense bargaining," . . . from those established by the trustees with full authority. . . . Nothing [here] suggests

that Rule 21 was established in collective bargaining.''); *Sellers v. O'Connell*, 701 F.2d 575, 577 (1983) ("The present case is distinguishable . . . because Resolution 72 was created, not by a collective bargaining agreement, but by the Fund's trustees"). The courts uniformly limit *Robinson* to bargaining agreements containing the fully developed rules and only then apply *Robinson* after a showing that the rules resulted from free negotiation by the parties in fulfilling their collective bargaining obligations.

3. Amendment 46 Violated a Positive Command of ERISA Because the Trustees Enacted It Primarily to Protect the Union And Not For the Benefit of the Participants of the Plan;

Chief Judge Hodges of the Middle District of Florida held that the trustees' desire to help the union in its fight for membership motivated them to adopt the bad boy/punitive clause. They did not act to protect the beneficiaries of the plan as ERISA requires. The Eleventh Circuit upheld these findings since substantial evidence supported them. The Eleventh Circuit opinion severely limited this holding to the facts saying that if the trustees had shown a rational relation between the amendment and the financial integrity of the plan consistent with fiduciary duties then a different result would follow. Petitioner's Appendix at 17a.

Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir.1977), holds that the court's role is "limited to determining whether the Trustee's interpretation [of the Plan] was made rationally and in good faith—not whether it was right." While a *bona fide* rational justification will support trustees' actions, where a trustee acts in bad faith

or in violation of the trustee's statutory duty an otherwise rational explanation will not suffice.

ERISA requires more of the Trustees than does the common law. If a pre-ERISA fiduciary fulfilled its duties conforming to the instruments governing the plan, the law excused its act. But, under ERISA:

ERISA provides that a fiduciary shall discharge his duties . . . in accordance with the instruments . . . governing the plan . . . [only] insofar as such . . . instruments are consistent with the provisions of this title. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). . . . Under ERISA [unlike the common law rule requiring compliance generally] a fiduciary may disregard the plan documents if compliance with the plan documents would be inconsistent with any of the provisions of ERISA.

J. Mamorsky, *Employee Benefits Law: Erisa and Beyond* § 1205[4], at 12-21 (1985 ed.) (New York: Law Journal Seminar Press).

Petitioners contend that since the collective bargaining agreement mandated Amendment 46 this prevented Amendment 46 from attack as arbitrary and capricious. This falls before ERISA's command of overriding duty to the Plan participants.

The trial court found arbitrary and capricious action and bad faith to fault trustee action. Compliance with the collective bargaining agreement would not excuse the Trustees since they acted in bad faith and not for the benefit of the participants, but rather for the benefit of the MM&P Union. *Robinson* pointed out that the legislative history of ERISA revealed that Congress intended it to prevent Union officials from overreaching beneficiaries

and to prevent the Union and its leadership from putting themselves first instead of looking after the beneficiaries' interests. *Robinson*, 455 U.S. 571 at n.9.

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981) holds:

[A] trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interest of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

Even if the collective bargaining agreement requires acts, the Trustees can excuse the acts commanded by the Plan documents only if these acts follow ERISA's commands. The Amendment in issue here did not.

4. Issue Preclusion and The Law of the Case Govern The Issues Here Because Of the Decision in a Companion Case Involving The Same Contract and Plan Provisions.

The District Court for the Southern District of New York passed on this exact issue arising from the same facts and Union contract. The trial court severed *Chambless* from *Deak* before trial. In an exhaustive footnote *Chambless v. Masters, Mates & Pilots Pension*, 571 F.Supp. 1430, 1443-44 n.21 (S.D.N.Y.1983), affirmed, 772 F.2d 1032 (2d Cir.1985), *cert. denied*, 475 U.S. 1012 (1986) discussed the application of *Robinson* to the precise amendments to the plan in suit here. The court found that *Robinson* did not apply. *Id.* 571 F.Supp. 1430 at n. 21. Issue preclusion bars this inquiry.

CONCLUSION

For the reasons set out, Respondents respectfully request the Court in its discretion to decline to issue the Writ of Certiorari prayed for.

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